Supreme Court, U.S
FILED

No. 15 35 APR 17 2003

OFFICE OF THE CLERK

In The

Supreme Court of the United States

KEVIN W. DAISEY,

Petitioner,

v.

NATIONAL TRANSPORTATION SAFETY BOARD, AND ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

KEVIN W. DAISEY
Petitioner, Pro Se

8601 Falmouth #406
Playa del Rey, CA 90293
(310) 305-2837

48

QUESTIONS PRESENTED

When the Federal Aviation Administration revokes a pilot's authorization, to perform supervisory duties within an air carrier's training department, does that air carrier pilot possess a *due process* right to notice concerning the revocation action, and does that pilot have a *due process* right to oppose the FAA's revocation action?

Did the court of appeals erroneously dismiss Captain Daisey's appeal of the FAA's revocation action, where the court failed to consider the *due process* obligations imposed with respect to a professional authorization or license?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner is Kevin W. Daisey, an individual citizen of the United States, residing in the State of Hawaii. Petitioner has no corporate affiliations. Kevin W. Daisey was the Appellant before the National Transportation Safety Board, and the Petitioner in the Court of Appeals for the Ninth Circuit.

Respondents

The National Transportation Safety Board ("NTSB") is an independent board of the United States government. The Federal Aviation Administration ("FAA") is an agency of the Department of Transportation of the United States. In the proceedings in the Ninth Circuit Court of Appeals, the FAA represented the interests of the NTSB.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	v
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	4
A. Factual Background	4
B. Proceedings Below	6
C. The Federal Statutory Scheme	8
Reasons for Granting the Petition	12
I. The Appeals Court's Memorandum Overlooked the Supreme Court's Prior Directions and Referenced the Wrong Statute	13
II. The Appeals Court's Memorandum Overlooked Established Law and Administrative Due Process	17
III. The Court's Rejection of Petitioner's Due Process Claims Overlooked the Undisputed Facts and the Applicable Law	20
Discussion	23
Conclusion	25

TABLE OF CONTENTS – Continued

Page

Appendix

Appendix A

Court of Appeals Memoradum, 11/22/02: *Daisey v. NTSB and FAA*, No. 02-70341 (9th Cir. 2002) .....App. 1

Appendix B

National Transportation Safety Board, Opinion and Order, Order No. EA-4989, dated 2/1/02 .....App. 3

Appendix C

National Transportation Safety Board, Order Dismissing Petition, Docket No. NA-37, dated 4/18/01 .....App.6

Appendix D

Court of Appeals Order, Denying Petition for Rehearing, dated 1/24/03: *Daisey v. NTSB and FAA*, No. 02-70341 (9th Cir. 2002).....App. 11

Appendix E

Federal Aviation Administration, Order Revoking Petitioner Daisey's FAA Approval to Act as a Check Airman, dated 3/28/01.....App. 12

Appendix F

National Transportation Safety Board, Order Errata, Order No. EA-4939, Docket No. NA-37, dated 2/1/02.....App. 14

TABLE OF AUTHORITIES

Page

CASES:

Adams v. FAA, 1 F.3d 955 (9th. Cir. 1993) 16

Bell v. Burson, 402 U.S. 535 (1972).....21, 23, 26

Bishop v. Wood, 426 U.S. 341 (1976) 22

Board of Regents v. Roth, 408 U.S. 564 (1972).....22

Boddie v. Connecticut, 401 U.S. 371 (1971).....21

Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886 (1961).....22

Clemente v. United States, 568 F.Supp. 1150 (C.D. Cal. 1983) 21

Green v. McElroy, 360 U.S. 474 (1959).....9, 26

Greenwood v. FAA, 28 F.3d 971 (9th Cir. 1994).....19

McNabb v. United States, 318 U.S. 332 (1943) 13

Stone v. Caplan, 10 F.3d 285 (5th Cir. 1994).....16

United States v. Koyomejian, 970 F.2d 536 (9th Cir. 1992).....15

STATUTES:

The Fifth Amendment, U.S.C.A. Fifth.....8, 21, 22

Federal Aviation Act, 49 U.S.C. § 44701 et seq.....*passim*

Administrative Procedure Act, 5 U.S.C. § 551 et seq 2, 9, 19, 24, 25

5 U.S.C. § 551(8) 13

5 U.S.C. § 558.....24

5 U.S.C. § 558(b) 18

TABLE OF AUTHORITIES – Continued

Page

5 U.S.C. § 558(c) 2, 10, 25
5 U.S.C. § 701(a)(1) 16
5 U.S.C. § 701(a)(2) 16
5 U.S.C. § 702 16
28 U.S.C. § 1254 1
49 U.S.C. § 44702(d) ..... *passim*
49 U.S.C. § 44702(d)(2) 17
49 U.S.C. § 44709 ..... 13, 15
49 U.S.C. § 44709(c) 2, 3, 10, 25
49 U.S.C. § 44709(d) ..... *passim*
49 U.S.C. § 44709(e) 7, 8

REGULATIONS AND AUTHORITIES:

14 C.F.R. Part 13 11
14 C.F.R. § 13.19 ..... 10, 11
14 C.F.R. § 121.401(a) 6
14 C.F.R. § 121.401(a)(4) 4
14 C.F.R. § 121.411 6
14 C.F.R. § 121.411(a)(1) 12
14 C.F.R. § 121.413 6
49 C.F.R. Part 821 11
49 C.F.R. § 821.54 7
Supreme Court Rule 10(a) 12
Supreme Court Rule 10(c) 12

TABLE OF AUTHORITIES – Continued

Page

Supreme Court Rule 29.4(a) 1

H.R. Report No. 3047, 81st Congress, (1950) 2nd Session, page 1, reprinted in 1950 U.S.C.C.A.N. 3792 ..... 15, 17

FAA Order 8700.10 ..... 9, 11, 19, 24

PETITION FOR WRIT OF CERTIORARI

Petitioner Daisey respectfully petitions that a writ of certiorari issue to review the Memorandum Dismissing Petition for Review, issued by the U.S. Ninth Circuit Court of Appeals in *Kevin W. Daisey v. National Transportation Safety Board and the Administrator of the Federal Aviation Administration* (02-70341, 9th Cir. 2002).

OPINIONS BELOW

The Ninth Circuit Memorandum is unreported, and is reprinted in the appendix to this petition ("App.") at App. 1-2. The Ninth Circuit's order denying rehearing is unreported and is reprinted at App. 11.

STATEMENT OF JURISDICTION

The Memorandum of the Ninth Circuit Court of Appeals was filed on November 22, 2002. A timely petition for rehearing or for reconsideration was denied on January 24, 2003. App. 11. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1254. In light of the fact that agencies of the United States are parties, notification and service has been provided to the U.S. Solicitor General in accordance with Supreme Court Rule 29.4(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The *Fifth Amendment* to the United States Constitution provides in pertinent part that "No person shall be

* * * deprived of life, liberty, or property without due process of law." In this case, however, Captain Kevin W. Daisey was deprived of the property interest which he possessed in his authorization to act as a supervisory pilot for his air carrier employer. His license to act as a company check airman was revoked. Daisey was further denied the property interest which he maintained in his professional reputation and good name. Daisey was not provided any notice of this FAA revocation action, nor was he allowed the opportunity to oppose the FAA's revocation action against him.

The *Administrative Procedure Act* (5 U.S.C. § 551 et seq.) provides in pertinent part that "the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before institution of agency proceedings therefor, the licensee has been given – (1) notice by the agency in writing of the facts or conduct which may warrant the action; and (2) opportunity to demonstrate or achieve compliance with all lawful requirements." 5 U.S.C. § 558(c). It is undisputed that Captain Daisey was not provided notice of the pending FAA action against him, nor was Daisey allowed to demonstrate or achieve compliance.

The revised *Federal Aviation Act* (49 U.S.C. § 44701 et seq.) provides in pertinent part that before the FAA Administrator may take action for the revocation of an airman authorization, license, or certificate, "the Administrator shall advise the holder of the certificate of the charges or other reasons on which the Administrator relies for the proposed action." 49 U.S.C. § 44709(c). It is undisputed that the FAA Administrator failed to provide Captain Daisey with any notice of the FAA's revocation action against him.

The revised *Federal Aviation Act* provides in pertinent part that before the FAA Administrator may take action for the revocation of an airman authorization, license, or certificate, "the Administrator shall provide the holder an opportunity to answer the charges and be heard why the certificate should not be amended modified, suspended, or revoked." 49 U.S.C. § 44709(c). It is undisputed that the FAA Administrator failed to provide Captain Daisey with any opportunity to oppose the FAA's revocation action against him.

The revised *Federal Aviation Act* provides in pertinent part that where pilot licenses, authorizations, or certificates have been revoked by the FAA Administrator, a "person adversely affected by an order of the Administrator * * * may appeal the order to the National Transportation Safety Board." 49 U.S.C. § 44709(d). Although Captain Daisey timely appealed, it is undisputed that Captain Daisey was denied this right of appeal by the NTSB.

The revised *Federal Aviation Act* provides in pertinent part that, with respect to the FAA Administrator's licensing authority, the Administrator "may delegate to a qualified private person" the Administrator's authority to conduct examinations and tests necessary to issue pilot licenses, and "may rescind a delegation" of this authority "at any time for any reason." 49 U.S.C. § 44702(d). It is undisputed that Captain Daisey was not delegated any licensing authority by the FAA Administrator. However, it is also undisputed that Captain Daisey was denied the opportunity for appeal and review based upon the FAA's

claim that Daisey's training supervisory duties were "akin to" the FAA's delegation of its licensing authority.

STATEMENT OF THE CASE

A. Factual Background

In a 3/28/01 letter to Hawaiian Airlines (App. 12-13), FAA Inspector Earl Young revoked Captain Kevin W. Daisey's FAA authorization to act as a company "check airman" for the airline. A company "check airman" performs training, and training supervisory functions for air carriers. It is a function which is a part of an airline's pilot training department. 14 C.F.R. § 121.401(a)(4). According to undisputed FAA written policies, such revocation generally serves as a permanent bar to any future such authorization or employment.

Captain Daisey was not provided any prior notice of the FAA's action against him, nor was Captain Daisey provided any opportunity to demonstrate or achieve compliance with any requirement for his job as a company "check airman" for Hawaiian. Although Captain Daisey also functioned as a pilot for the airline, often operating regularly scheduled passenger flights, it was undisputed that Captain Daisey had been hired by the airline, more than fifteen (15) years earlier, specifically to perform "check airman" and supervisory functions within Hawaiian's pilot training department. The FAA's revocation action served to bar Captain Daisey from his normal employment, or any future opportunity to serve in the position for which he had been employed.

Therefore, when Captain Daisey learned of the FAA's revocation action against him, indirectly through public disclosures and statements made by FAA Inspector Johannes Linschoten to members of the local aviation community, Captain Daisey appealed the FAA's revocation to the National Transportation Safety Board. Such appeal is authorized under the terms of the revised Federal Aviation Act. 49 U.S.C. § 44709(d).

Based upon the FAA's claim, that Captain Daisey's check airman authorization was "akin to" the FAA's delegation of its licensing authority, in a 4/18/01 Order, an NTSB administrative law judge dismissed Captain Daisey's appeal to the Board. The law judge noted that "designees serve as fiduciaries of the Administrator in the certification process."[1] App. 9. The law judge accepted the FAA's argument that Captain Daisey's authorization, to function as a "check airman" for his air carrier employer, was "akin to" the FAA's delegation of its licensing authority under the terms of 49 U.S.C. § 44702(d). However, in opposition to Captain Daisey's Petition for Review to the Ninth Circuit Court of Appeals, the FAA Administrator acknowledged that an air carrier "check airman" performs no licensing function on behalf of the FAA Administrator.[2]

---

[1] The term "designee" references persons delegated the FAA's licensing authority as a "Pilot Examiner Designee," or PED.

[2] Both the law judge's *Order Dismissing Petition* (App. 6-10), and the Board's *Opinion and Order* (App. 3-5), erroneously refer to 49 U.S.C. § 44709(d) instead of § 44702(d). However, in a 3/13/02 Order (App. 14), the Board's chief counsel corrected the error in the Board's order. The citation error appears throughout the law judge's order (supra) and was never corrected.

As a result of the NTSB law judge's dismissal of his appeal, on 4/24/01, Captain Daisey timely appealed the FAA's revocation action to the full National Transportation Safety Board. Daisey pointed out to the full Board that he had not been delegated any FAA licensing authority, noting that his responsibilities were an air carrier supervisory and quality assurance function, rather than an FAA licensing designation. However, citing the FAA Administrator's discretionary authority, again with respect to the delegation of licensing authority under the terms of 49 U.S.C. § 44702(d), the Board dismissed Captain Daisey's appeal.

According to the provisions of the Federal Aviation Regulations ("FAR's"), and the FAA's written guidance materials, as cited and provided as evidence to the NTSB, air carriers are required to hire and maintain a sufficient cadre of instructors and "check airmen" to assure the proper implementation of required pilot training programs. 14 C.F.R. § 121.401(a). In addition, according to FAA policies, these "check airmen" are to be fully trained and qualified to act as pilots for the airline. 14 C.F.R. § 121.411. In addition, air carrier "check airmen" are required to be trained by their airline in the air carrier's particular training and checking procedures. 14 C.F.R. § 121.413.

B. Proceedings Below

After the FAA issued its 3/28/01 letter revoking Captain Daisey's approval to act as a company "check airman" for Hawaiian Airlines (App. 12-13), on 4/10/01 Daisey timely appealed that revocation to the NTSB. Given the immediate force and effect of the FAA's revocation,

Daisey made his appeal as an emergency proceeding, as is allowed under the terms of the Board's rules and the provisions of the Federal Aviation Act. 49 C.F.R. § 821.54 and 49 U.S.C. § 44709(e).

On 4/12/01, in accordance with the time limit described within the NTSB's *Rules Applicable to Emergency Proceedings* (49 C.F.R. § 821.54), the FAA Administrator opposed Captain Daisey's *Petition For Review of Emergency Order*. On that same day, the FAA Administrator also filed a *Motion to Dismiss Appeal*. On 4/16/01, Captain Daisey timely opposed the FAA's *Motion to Dismiss*. However, on 4/18/01, again within the time limits set forth by the Board for Emergency Proceedings, NTSB law judge Fowler dismissed Captain Daisey's appeal petition (App. 6-10). This dismissal was based upon FAA counsel's claim that the Board lacked jurisdiction to hear Captain Daisey's appeal. In his order, the law judge referenced the FAA's claim that Captain Daisey's airline job was "akin to" the FAA licensing authority specified within 49 U.S.C. § 44702(d).[3]

On 4/24/01, Captain Daisey provided a timely *Notice of Appeal* of his case to the full NTSB. Then, on 4/30/01 Daisey timely filed his *Appeal Brief* with the full NTSB. The FAA timely supplied its opposition to Captain Daisey's appeal within its 5/7/01 *Reply Brief*. Again, all of this was within the time limits prescribed by the Board under its Emergency Rules.

---

[3] The law judge's order (App. 6-10) erroneously references 49 U.S.C. § 44709(d), an error otherwise corrected within the Board's Amended Order (App. 14).

Without regard for the time limits set within its Emergency Rules, or the sixty (60) day limit set forth for their final action under the terms of the Federal Aviation Act (49 U.S.C. § 44709(e)), the Board delayed its *Opinion and Order* in this case until 2/1/02. This was nearly a year later. The full NTSB affirmed its law judge's dismissal of Captain Daisey's appeal, citing the same erroneous statutory references as had been used by the law judge in his order (App. 12-13). However, six weeks later, upon receipt of Captain Daisey's Notice of Appeal to the U.S. Court of Appeals, on 3/13/02 the Board's counsel corrected the erroneous statutory references that had been provided within the Board's *Opinion and Order* (App. 14).

Captain Daisey filed a notice of his Petition for Review with the U.S. Ninth Circuit Court of Appeals on 2/22/02. After the timely completion of briefing, on 5/3/02, Captain Daisey's Petition was submitted for consideration without oral argument. This submission was accomplished over Captain Daisey's objections.

On 11/22/02, a panel of the Ninth Circuit issued a two page Memorandum denying Captain Daisey's Petition (App. 1-2). Thereafter, Captain Daisey timely petitioned the Ninth Circuit for its rehearing or reconsideration, wherein he reiterated his request that he be allowed oral argument with respect to the issue of *due process* and the established law with respect to the requirement for *due process.* However, on 1/24/03, the Ninth Circuit's panel denied Captain Daisey's petition for rehearing. App. 11.

C. The Federal Statutory Scheme

Beyond the requirements for *due process*, as set forth within the Fifth Amendment (U.S.C.A. Amendment V),

U.S. federal law provides for several layers of protection which apply to a professional airman who faces the revocation of his authorization to function in an air carrier's pilot training program. These protections are provided under the terms of the *Administrative Procedure Act* (5 U.S.C. § 551 et seq.), the revised *Federal Aviation Act* (49 U.S.C. § 44701 et seq.), the Code of Federal Regulations (14 C.F.R. Part 13; and, 49 C.F.R. Part 821), and the FAA Administrator's written policy orders (FAA Order 8700.10).

Preliminarily, the Supreme Court has consistently held that U.S. federal administrative agencies, and the courts which oversee them, are responsible to assure that the requirements for *due process* of law are followed. This is especially true for a professional airman who faces the revocation of his government authorization to hold employment in his chosen field:

> "The right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment."

Green v. McElroy, 360 U.S. 474, 492 (1959).

This *due process* right has been further defined and refined by Congress. It is the *Administrative Procedure Act* which otherwise provides the first layer of protection for any person facing adverse government action against professional credentials.

> "[T]he withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given –

> (1) notice by the agency in writing of the facts or conduct which may warrant the action; and
>
> (2) opportunity to demonstrate or achieve compliance with all lawful requirements."

5 U.S.C. § 558(c).

This requirement for notice is mirrored within the requirements of the *Federal Aviation Act*, where Congress required:

> (c) Advice to Certificate Holders and Opportunity To Answer. –
>
> Before acting under subsection (b)[4] of this section, the Administrator shall advise the holder of the certificate of the charges or other reasons on which the Administrator relies for the proposed action. Except in an emergency, the Administrator shall provide the holder an opportunity to answer the charges and be heard why the certificate should not be amended, modified, suspended, or revoked.

49 U.S.C. § 44709(c).

This requirement for notice and hearing is also fully reflected within the terms of the Federal Aviation Regulations (14 C.F.R. § 13.19). However, in cases where the FAA Administrator determines to proceed with an airman

---

[4] This refers to 49 U.S.C. § 44709(b), the statute which empowers the FAA Administrator to modify, suspend, or revoke a license issued by the FAA.

license revocation, the *Federal Aviation Act*, as further defined by both the FAA and NTSB within their own regulations (14 C.F.R. Part 13, and 49 C.F.R. Part 821), provides for an appeal to the NTSB.

> (1) A person adversely affected by an order of the Administrator under this section may appeal the order to the National Transportation Safety Board.

49 U.S.C. § 44709(d).

Although the FAA has implemented a regulatory process for notice, review and appeal (14 C.F.R. § 13.19), Captain Daisey was not afforded this appeal and review process. Captain Daisey was not provided notice by the FAA, or the appeal otherwise to be heard by the NTSB. This lack of process was based on the FAA's assertion that Captain Daisey's situation was "akin to" the discretionary authority provided the FAA Administrator with respect to the delegation of the FAA's licensing power. 49 U.S.C. § 44702(d). However, even FAA licensing designees possess a right to notice, review, and appeal under the terms of the FAA's own written policy orders (FAA Order 8700.10).

Thus, at the court of appeals, the FAA asserted that this FAA internal notice and appeal process was not due Captain Daisey. The FAA claimed that it was not required to notify Captain Daisey, or provide him an opportunity for appeal or review, where Daisey had not been delegated any of the FAA Administrator's licensing authority. The FAA tacitly acknowledged that the statute (49 U.S.C. § 44702(d)), upon which they originally based their claim of discretionary authority, did not apply to Captain Daisey. However, this did not deter the appeals court from erroneously citing that statute in their Memorandum. App. 2.

Somehow, each of the protective procedural safeguards, otherwise provided under the terms of law, regulations, and the FAA's written policies, were not allowed Captain Daisey. However, Captain Daisey otherwise possessed a right to some *due process*, before the FAA could take its revocation action against him. This requirement for *due process* has been defined by the Court. However, neither the Ninth Circuit's panel nor the FAA Administrator would allow Captain Daisey the opportunity to oppose the FAA's action against him.

REASONS FOR GRANTING THE PETITION

Petitioner Daisey seeks a writ of certiorari for the Court's review and guidance with respect to the lack of required due processes, prior to the revocation of Captain Daisey's professional authorization. The Ninth Circuit's Memorandum violated substantial prior directions and the established precedent of the Supreme Court. (Supreme Court Rules 10(a) and 10(c)).

As a preliminary matter, the FAA has defined the areas of responsibility for an airline "check airman." The FAA defines a "check airman" as an air carrier employee who is "qualified, and permitted, to conduct flight checks or instruction in an airplane" as a part of an airline's pilot training program. 14 C.F.R. § 121.411(a)(1). This contrasts to the duties defined for a person who is delegated the FAA's licensing authority. An FAA Pilot Examiner Designee (PED), is authorized to issue FAA licenses (certificates) on behalf of the FAA Administrator. However, according to the FAA's admissions to the Ninth Circuit, a

check airman, such as Captain Daisey, has no authority with respect to airman licensing.

The FAA's approval of an air carrier check airman constitutes a license under the terms of the Administrative Procedure Act.

> (8) "**license**" *includes* the whole or a part of an *agency* permit, certificate, *approval*, registration, charter, membership, statutory exemption *or other form of permission*;

5 U.S.C. § 551(8) (emphasis added).

As a license issued by the FAA Administrator, Captain Daisey's "check airman approval" was protected under the notice and appeal provisions of the Federal Aviation Act. 49 U.S.C. § 44709. None of the required notices, or the opportunity for appeal and review, were allowed Captain Daisey. This was a procedural shortfall where the Court has previously observed that "[t]he history of liberty has largely been the history of observance of procedural safeguards," *McNabb v. United States*, 318 U.S. 332, 347 (1943).

I. The Appeals Court's Memorandum Overlooked the Supreme Court's Prior Directions, and Referenced the Wrong Statute.

The appeals court's 11/22/02 Memorandum references 49 U.S.C. § 44702(d) as the basis for denying Daisey's *Petition for Review* (App. 2). However, the undisputed facts of record demonstrated that the cited statute did not apply to the situation presented for the appeals court's review. The FAA even admitted that Captain Daisey was not delegated any of the FAA Administrator's licensing authority, as

might apply to the cited statute. The issue presented for the appeals court's review concerned the FAA's revocation of a license, or "FAA Approval," issued to Petitioner Kevin Daisey. The revocation was accomplished without notice, and without providing the review and appeal processes otherwise mandated by law.

The law cited in the appeals court's Memorandum (App. 2) is clear that it did not apply to this case.

> (d) Delegation. –
>
> > (1) Subject to regulations, supervision, and review the Administrator may prescribe, the Administrator may delegate to a qualified private person, or to an employee under the supervision of that person, a matter related to –
> >
> > > (A) the examination, testing, and inspection *necessary to issue a certificate under this chapter*; and
> > >
> > > (B) *issuing the certificate.*

49 U.S.C. § 44702(d) (emphasis added).

There is no reference in the cited law to the situation and undisputed facts presented in the *Petition for Review*. The statute deals exclusively with the power to issue licenses, or certificates, on behalf of the Administrator of the Federal Aviation Administration. It does not directly or implicitly apply to any license or approval which the

Administrator issued to Petitioner Daisey.[5] Any FAA license, or other approval, is subject to the protective provisions of the Federal Aviation Act. 49 U.S.C. § 44709.

The stated Congressional intent, with respect to the purpose of the original law, concerning the delegation of FAA licensing authority, was quite clear:

> "The functions which may be delegated *** are those (1) respecting the examination, inspection, and testing necessary to the issuance of certificates under title VI [dealing with safety regulations] of the Civil Aeronautics Act, and (2) the issuance of such certificates in accordance with standards properly established."

H.R. Report No. 3047, 81st Congress, 2nd Session (1950), page 1, reprinted in 1950, U.S.C.C.A.N. 3792 (discussing amendment of the Civil Aeronautics Act of 1938); 49 U.S.C. § 44702(d) was previously codified at 49 U.S.C. § 1355(d).

There has been no substantive change or amendment to the original statute which might affect its meaning or applicability. In any event, it would be improper for the court of appeals to mold the cited statute into a grant of discretion which does not exist within the plain language of the law. *U.S. v. Koyomejian*, 970 F.2d 536, 541 (9th Cir. 1992) (A court is charged with the duty to interpret the laws as they exist rather than to mold them into a new

---

[5] When Congress first considered the provisions of 49 U.S.C. § 44702(d), the legislative history demonstrates that they exclusively intended it to mean the delegation of the licensing (or certification) authority of the FAA Administrator. H.R. Report No. 3047, supra.

form meeting its own notion of symmetry). See also: *Stone v. Caplan*, 10 F.3d 285, 289 (5th Cir. 1994) (The goal of statutory construction is to ascertain legislative intent through the plain language of a statute). The panel's Memorandum creates a conflict between the circuits and conflicts with the Ninth Circuit's own precedent.

Instead, where the FAA Administrator revoked approval for Petitioner Daisey to function as a company "check airman" for his air carrier employer, well established law provides that Daisey had both a right to administrative appeal and to subsequent judicial review.

> "The APA confers a general cause of action upon any person 'adversely affected or aggrieved by agency action within the meaning of a relevant statute,' 5 U.S.C. § 702 (1988), but withdraws that cause of action to the extent that the relevant statute 'preclude[s] judicial review' or 'agency action is committed to agency discretion by law.' 5 U.S.C. § 701(a)(1) and (2) (1988)."

Adams v. FAA, 1 F.3d 955, 956 (9th Cir. 1993).

The plain language of the statute, cited within the appeals court's Memorandum (App. 2), draws no discernible nexus to the result in this case. The agency action was not committed to agency discretion by law. Where the cited statute exclusively references the delegation of the FAA's licensing authority to individuals, there is no reference to any statutory authority for the FAA to revoke approval for individuals to work in air carrier training functions which are unrelated to the delegation of the FAA's licensing authority.

The statutory discretion, conferred by the law cited within the Ninth Circuit's Memorandum, specifically references the FAA's licensing authority.[6]

> (2) The Administrator may rescind a delegation under this subsection at any time for any reason the Administrator considers appropriate.

49 U.S.C. § 44702(d)(2).

A broader grant of discretion, denying Petitioner Daisey administrative review or appeal, was neither anticipated by Congress nor specified within the literal terms of the law. The appeals court's Memorandum ignores its own precedent and the requirements for administrative due process which has been consistently noted within the Supreme Court's decisions. Consequently, the Court should summarily reverse the Ninth Circuit's denial of Captain Daisey's Petition for Review, and order the appeals court to reconsider its Memorandum in accordance with the Court's prior direction and precedent.

II. The Appeals Court's Memorandum Overlooked Established Law and Administrative Due Process Requirements.

The substance of this case concerns the failure of both the FAA and NTSB to follow the requirements of the law and their own procedures. First, it was Petitioner Daisey's contention that the proper forum for the appeal and review of this case was the National Transportation Safety Board. However, where any credence might be given the

---

[6] H.R. Report No. 3047, supra.

FAA's claim that the revocation of Petitioner Daisey's FAA "check airman" approval is "akin to" the FAA's delegation of its licensing authority, Daisey's *Petition for Review* alternatively asserted that he was also denied the notice, review, and appeal processes which FAA policy orders have established with respect to the revocation of any such delegation of FAA licensing authority.

There was no dispute, in this case, that Petitioner Daisey neither received the necessary notice or any opportunity to demonstrate or achieve compliance. However, where the statute cited in the panel's Memorandum does not apply (ante), there has never been a claim that the above cited APA provisions are not applicable. Thus, the FAA revocation action in this case was contrary to law.

> "A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."

5 U.S.C. § 558(b)

Specific administrative appeal and review processes have been established where the FAA seeks the suspension or revocation of airman authority. Thus, the above cited provisions of law are superseded by a specific process applicable to the revocation of the FAA Check Airman approval in this case. The *Federal Aviation Act* places the responsibility to hear appeals, of FAA revocations, directly within the purview of the National Transportation Safety Board:

> (d) **Appeals.** – (1) *A person adversely affected by an order of the Administrator under this section may appeal the order to the National Transportation Safety Board.* After notice

> and an opportunity for a hearing, the Board may amend, modify, or reverse the order when the Board finds –
>
> (A) if the order was issued under subsection (b)(1)(A) of this section, that safety in air commerce or air transportation and the public interest do not require affirmation of the order;

49 U.S.C. § 44709(d) (emphasis added).

It was the FAA's contention that its revocation action was taken under the authority of 49 U.S.C. § 44702(d). However, as specified in great detail within Daisey's *Petition for Review,* the FAA has established its own internal review and appeal process in cases where the delegation of its licensing authority has been revoked. That process requires agency notification, factual review and investigation, and an independent review (FAA Order 8700.10). Even one of the cases cited in the panel Memorandum makes reference to these internal FAA procedures. See: *Greenwood v. FAA*, 28 F.3d 971, 974-75 (9th Cir. 1994) (Noting that the FAA has established internal procedures to guide in the review and appeal of the revocation of FAA delegated examiner authority).

In this case, however, Petitioner Daisey was refused the proper appeal process established for airmen under the *Federal Aviation Act*. Daisey was also denied the processes required by the *Administrative Procedure Act*, as well as those established under the provisions of the FAA's own rules and policy orders. Thus, the panel's 11/22/02 Memorandum (App. 1-2) overlooked established law and the administrative appeal and review requirements which both law and policy otherwise require. Consequently, the

Court should summarily reverse the Ninth Circuit's Memorandum, and the case should be returned for reconsideration in line with the Court's established precedent and directions.

III. The Court's Rejection of Petitioner's Due Process Claims Overlooked the Undisputed Facts and the Applicable Law.

Within his *Petition for Review*, Petitioner Daisey amply referenced the undisputed facts of record to demonstrate that, as a result of the FAA's action against him, Daisey was removed from his regular employment as a check airman for Hawaiian Airlines. Petitioner Daisey also extensively cited the undisputed facts to show that an FAA inspector widely circulated news of the FAA's revocation action against him. That news substantially damaged Daisey's good name and reputation in the airline business, a reputation which Daisey maintained for many years. This fact was established in the record, referenced within the petition, and was undisputed. In this way, Petitioner Daisey demonstrated both a property and liberty interest which was adversely affected by the FAA's action against him.

The panel Memorandum, however, overlooked these undisputed facts (App. 1-2). The Memorandum simply stated that Daisey "failed to show a liberty or property interest." This conclusion was contrary to the facts. The panel Memorandum apparently accepted the FAA claim that Daisey found other employment, even though it was not in the airline training function for which Daisey had originally been hired by his employer. The panel Memorandum did not reference any reason for summarily rejecting Daisey's *due process* claims.

In the present case, Captain Daisey's FAA Check Airman approval constituted a license for him to pursue his career as a Check Airman for Hawaiian Airlines. As such, that FAA Check Airman approval qualifies as a protectible property interest. See: *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The Fifth Amendment provides that:

> "No person shall be . . . deprived of life, liberty or property without due process of law."

U.S.C.A. Amendment V

The Check Airman approval which Captain Daisey possessed qualified as a government license under all definitions of the law. Captain Daisey's reliance on that license, to pursue his livelihood, qualified as a protectible property interest. See: *White v. Franklin*, 637 F.Supp. 601, 610 citing; *Bell v. Burson*, 402 U.S. 535, 539 (1972) (license or property interest entitled to procedural due process). Thus, Fifth Amendment procedural *Due Process* protections were required prior to the FAA's revocation of Captain Daisey's Check Airman approval, especially if the court was to conclude that Daisey was not due either the administrative appeal specified by the *Federal Aviation Act* (supra) or that appeal set forth within the FAA's own policy orders.

Further, the right to pursue a specific profession qualifies as a liberty interest whether the employment is private or public. See: *Clemente v. United States*, 568 F.Supp 1150, 1168 (C.D. Cal. 1983), reversed on other grounds, 766 F.2d 1858 (9th Cir. 1985). In the present case, the FAA's revocation action totally foreclosed Captain Daisey's career as a Check Airman with Hawaiian Airlines, the job for which he had been hired more than

fifteen (15) years earlier and for which he had maintained an impeccable reputation. Cf. *Cafeteria & Restaurant Workers v. McElroy*, 367 U.S. 886, 896 (1961) (no liberty interest if terminated employee remains free to secure other employment in chosen profession).

"Liberty" as used in the Fifth Amendment, includes a person's interest in his good name, reputation, honor, or integrity. *Board of Regents v. Roth*, 408 U.S. 564, 573 (1972). Absent public disclosure of reasons for the revocation of Captain Daisey's FAA approval, the mere fact of the revocation, by itself, would not trigger the 'liberty' protections of the Constitution. *Bishop v. Wood*, 426 U.S. 341, 348 (1976). However, the undisputed facts demonstrate that not only were such disclosures made to Captain Daisey's employer, but FAA Inspector Johannes Linschoten also made unprivileged disclosures to members of the local aviation community. It was through these public disclosures that Captain Daisey first learned of the FAA revocation action against him. Thus, the FAA's actions denied Captain Daisey his good name and tarnished a long held reputation for excellence.

Given the undisputed facts in this case, Captain Daisey possessed both a property interest, and a liberty interest, invoking Fifth Amendment *Due Process* protections. Not only was Captain Daisey denied a hearing, but he was entirely denied any notice of the FAA's action against him. Thus, Captain Daisey was denied his Constitutionally protected rights to both property and liberty. The denial of these rights came without any *Due Process* of law. Consequently, the Court should summarily reverse the Ninth Circuit's Memorandum, and return this case for

further consideration in line with the Court's prior precedent and directions.

DISCUSSION

This is not a case where Petitioner Daisey seeks to have provisions of the Federal Aviation Act (49 U.S.C. § 44702(d)) declared unconstitutional. Those provisions, as cited by the NTSB's law judge, did not apply. The FAA acknowledged that Captain Daisey was not delegated any licensing authority by the FAA Administrator, as might trigger statutorily allowed FAA discretion for revocation. However, even if the discretionary authority of the FAA Administrator was a question, the Court has already stated the requirements of the law in a long line of cases involving administrative agencies. (These cases were extensively cited by Captain Daisey in his petition to the court of appeals, and within his petition for reconsideration). The Court has consistently stated that the requirements of due process apply to holders of professional licenses, certificates, and authorizations, such as Captain Daisey. *Bell v. Burson*, supra.

The only true issue in this case involves the failure of the FAA and NTSB to allow Captain Daisey the appeal and review processes which already exist. Where it was Captain Daisey's position that he should have been allowed the appeal process defined under the terms of the Federal Aviation Act (49 U.S.C. § 44709), for review by the NTSB, Captain Daisey was denied that opportunity for appeal and review.

However, where the NTSB agreed that Captain Daisey's FAA check airman authorization was "akin to" the

FAA's delegation of its licensing authority, Captain Daisey was also denied the process of notice, review, and appeal as is defined under the terms of the FAA's own policy orders for the revocation of such delegations (FAA Order 8700.10). Captain Daisey was most assuredly denied the opportunity to "demonstrate or achieve compliance," with any shortfall cited within the FAA's revocation, as would otherwise be mandated under the terms of the Administrative Procedure Act. 5 U.S.C. § 558.

Where there might have been a question as to which process should have been followed, the Court of Appeals failed in its responsibility to resolve that issue. Captain Daisey was denied any opportunity for appeal or review. The NTSB refused to hear Captain Daisey's case under terms of the Federal Aviation Act. 49 U.S.C. § 44709. The FAA failed to follow the requirements for notice and review under the terms of the Administrative Procedure Act. 5 U.S.C. § 558. The FAA also failed to follow its own policy orders with respect to notice, appeal, and review, as would apply to its licensing designees (FAA Order 8700.10). Finally, the Ninth Circuit failed to follow the requirements and processes which the Court has previously and consistently directed.

Although the undisputed facts, cited by Captain Daisey within his petition to the court of appeals, demonstrated that Daisey was removed from his normal job responsibilities as a result of the FAA action against him, and that an FAA inspector circulated news of the revocation action against Daisey to the aviation community at large, the court of appeals simply glossed over these undisputed facts. The Ninth Circuit's panel erroneously asserted that Captain Daisey had "failed to show a liberty or property interest in [his] check airman authority." App.

2. However, Captain Daisey clearly cited these facts within his petition to the court of appeals, along with the undisputed fact that the FAA's revocation action effectively denied Captain Daisey the opportunity to continue in the job for which he had originally been hired by Hawaiian Airlines.

Where the Court has directed that professional licenses and authorizations are subject to the *due process* requirements of the law, Captain Daisey has been denied all such rights to these processes. Captain Daisey has not been allowed any opportunity for notice, appeal, or review, as is otherwise required under the terms of any of the statutes which might be applied to this case. In this regard, the Ninth Circuit's panel erroneously failed to act in accordance with this Court's clear directions.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be granted. The Memorandum dismissing Captain Daisey's Petition for Review, to the U.S. Ninth Circuit Court of Appeals, should be summarily reversed. The case should further be remanded for consideration in line with the requirements of the *Administrative Procedure Act* (5 U.S.C. § 558(c)), and the requirements of the *Federal Aviation Act* (49 U.S.C. § 44709(c) and (d)). This action is consistent with the Court's direction in a long line

of prior cases, including *Bell v. Burson*, 402 U.S. 535, 539; and, *Green v. McElroy*, 360 U.S. 474, 492.

Respectfully submitted,

KEVIN W. DAISEY
Petitioner Pro Se
8601 Falmouth #406
Playa del Rey, CA 90293
Phone: (310) 305-2837

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN W. DAISEY, Petitioner, v. NATIONAL TRANSPORTATION SAFETY BOARD; et al., Respondents.	No. 02-70341 NTSB No. NA-37 MEMORANDUM* (Filed Nov. 22, 2002)

On Petition for Review of an Order of the National Transportation Safety Board

Submitted November 18, 2002**

Before: REINHARDT, RYMER, and SILVERMAN, Circuit Judges.

Kevin W. Daisey petitions pro se for review of the decision of the National Transportation Safety Board ("NTSB") that it lacks jurisdiction over Daisey's appeal from a decision of the Federal Aviation Administration ("FAA"). We have jurisdiction under 49 U.S.C. § 1153(a). We review de novo the NTSB's conclusions of law. Olsen

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2). Accordingly, we deny Daisey's motion for oral argument.

v. National Transp. Safety Bd., 14 F.3d 471, 474 (9th Cir. 1994). We deny the petition for review.

The NTSB correctly determined that it lacked jurisdiction over Daisey's appeal of the FAA's revocation and non-approval of check airman authority because check airmen serve under the Administrator's delegated authority, which the Administrator may rescind "at any time for any reason." 49 U.S.C. § 44702(d); *cf. Adams v. FAA*, 1 F.3d 955, 956-57 (9th Cir. 1993) (per curiam) (holding that this court lacked jurisdiction to review the FAA's decision to not renew a pilot examiner designation); *Greenwood v. FAA*, 28 F.3d 971, 974-75 9th Cir. 1994) (same.).

Because Daisey has failed to show a liberty or property interest in check airman authority, we deny his due process claims. *See Greenwood*, 28 F.3d at 975-77.

We have reviewed and rejected Daisey's remaining contentions.

PETITION DENIED.

APPENDIX B

SERVED: February 1, 2002

NTSB Order No. EA-4939

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL
TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 24th day of January, 2002

In the matter of	)	
KEVIN W. DAISEY,	)	Docket NA-37
Petitioner-Appellant.	)	

OPINION AND ORDER

By written decision served April 18, 2001,[1] Administrative Law Judge William E. Fowler, Jr., dismissed, on the Administrator's motion, a petition filed by the appellant that sought, among other things, Board review of the Administrator's withdrawal of petitioner's authority to serve as a check airman for Hawaiian Airlines in Boeing B-717 aircraft. The law judge concluded that the Administrator's Motion to dismiss correctly demonstrated that the Board does not have jurisdiction over check airman authorizations. Because we agree with that conclusion, we

[1] A copy of the order is attached.

will deny the petitioner's request that we reverse the law judge's decision.[2]

Appellant's appeal brief presents several arguments reflecting his disagreement, for mostly extraneous or insubstantial reasons, with the law judge's determination that the conferral or taking away of check airman authority lies beyond the scope of the Board's statutorily enumerated powers. Specifically, the law judge ruled that the withdrawal of check airman authority does not amount to the amendment, modification, suspension, or revocation of a certificate issued under 49 U.S.C. § 44709(b), which specifies the parameters of the Board's certificate action review role, but, instead, flows from separate authority that the Administrator possesses under Section 44709(d) both to delegate, in effect, some of her certification powers and to rescind any such delegation "at any time for any reason. . . ."

In the absence of express authority to examine the validity of the discretion the Administrator exercises under Section 44709(d), it is of no legal consequence that there may be similarities between the privileges of or prerequisites for check airman authority and the authority conferred by an airman certificate, or that the loss of check airman authority may produce negative economic impact for a certificate holder.[3] Such circumstances do not alter a

---

[2] The Administrator has filed a reply brief opposing the appeal.

[3] This is not to say that the Administrator's exercise of discretion with respect to the designation or removal of check airmen authority is beyond review. It is simply not subject to review here. The process that is due an airman aggrieved by losing such authority is a question for the courts.

statutory scheme that does not contemplate Board review of challenges to decisions made under a provision that enables the Administrator to enlist private individuals to facilitate the administration of her licensing responsibilities.

Inasmuch as the appellant has established no error in the law judge's legal analysis of the pertinent law, we will adopt the law judge's decision as our own and deny the appeal.

ACCORDINGLY, IT IS ORDERED THAT:

1. The appellant's appeal is denied; and

2. The April 18, 2001 order of the law judge is affirmed.

BLAKEY, Chairman, CARMODY, Vice Chairman, and HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

APPENDIX C

SERVED: April 18, 2001

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the matter of KEVIN W. DAISEY, Petitioner-Appellant.	)	Docket NA-37

ORDER DISMISSING PETITION FOR REVIEW OF "EMERGENCY DETERMINATION" AND APPEAL OF "EMERGENCY ORDER OF REVOCATION" FOR LACK OF JURISDICTION

SERVICE:

Robert C. Konop,
Representative
Post Office Box 5065
Playa del Rey, Cal. 90296
(*BY CERTIFIED MAIL*)

James W. Tegtmeier, Esq.
Federal Aviation
Administration
Office of Chief Counsel
800 Independence Ave., S.W.
Washington, D.C. 20591
(*BY REGULAR MAIL AND FAX*)

On April 11, 2001, this office received from petitioner-appellant's representative via Federal Express a document captioned "Petition for Review of Emergency Order, Notice of Appeal and Answer to FAA Complaint," relating to a March 28, 2001 letter issued to the Director of Flight Standards of Hawaiian Airlines, Inc., by Earl R. Young,

the principal operations inspector who oversees the operations of Hawaiian Airlines for the Federal Aviation Administration ("FAA"). In that letter, Inspector Young stated as follows:

> We are notifying you in accordance with the Air Transportation Inspectors Handbook 8400.10, Volume 3, Chapter 3, Section 2, Paragraph 703C that we are unable to approve [petitioner-appellant] Federal Aviation Administration (FAA) certificate number 149480745 as a check airman in the B-717. We are therefore also withdrawing his check airman authority in the DC-9 effective immediately.
>
> The reasons are his performance during his own line check in the B-717 on March 21, 2001 and his performance when administering two Simulator Proficiency Checks for the B-717 on March 24, 2001. We expect a Check Airman in the B-717 for Hawaiian Airlines to demonstrate and be able to demonstrate, beyond any doubt the use of all equipment in the aircraft to the maximum extent possible. He should also support all company procedures and not transmit non-standard philosophies to the Line Pilots being checked.
>
> [Petitioner-appellant]'s deficiencies in performance in these areas have left great doubt that he will be able to represent the Administrator as a Check Airman in this aircraft. Therefore, we are left no choice but to resort to the action of disapproval and withdrawal of this privilege and request the return of his DC-9 Check Airman authorization letter within ten working days after receipt of this letter.

The Administrator, through counsel, subsequently submitted, in opposition to the aforesaid filing by petitioner-appellant, two documents, captioned "Opposition to the Petition for Review of an Immediately Effective FAA Action" and "Administrator's Motion to Dismiss the Appeal for Lack of Jurisdiction." Thereafter, a reply to the Administrator's submissions was filed by petitioner-appellant's representative. For the reasons set forth below, the undersigned believes that the Board is wholly without jurisdiction to review the FAA action complained of by petitioner-appellant, and that his petition and appeal must, therefore, be dismissed.

49 U.S.C. § 44709(b) provides that the Administrator "may issue an order amending, modifying, suspending or revoking . . . any part of *a certificate*" issued under 49 U.S.C. Chapter 447, when she finds that safety in air commerce or air transportation and the public interest require such action (emphasis added). 49 U.S.C. § 44709(d) permits a certificate holder affected by such an order to appeal that order to the Board.

Under 49 U.S.C. § 44709(e), the filing by a certificate holder of an appeal from an order issued by the Administrator under § 44709(b) stays the effectiveness of that order, unless the Administrator finds that there exists an emergency, requiring her order to be effective immediately. In such cases, 49 U.S.C. § 44709(e)(3) permits a certificate holder who is affected by an emergency or immediately effective order to, as a preliminary matter, seek Board review of the Administrator's emergency determination.

In this proceeding, petitioner-appellant asserts that the action of the FAA's principal operations inspector

overseeing his air carrier-employer should be considered a 49 U.S.C. § 44709(b) certificate action, reviewable by the Board under §§ 44709(d) and 44709(e)(3), in that "[his] airman privileges, as directly related to his job responsibilities . . . have been revoked and . . . the privileges of his Airline Transport Pilot Certificate have been modified and limited with *immediate* force and effect."[1] However, the action complained of by petitioner-appellant herein is not an order amending, modifying, suspending or revoking, in whole or in part, a Chapter 447 *certificate*. As the Administrator has pointed out in her submissions in response to his petition and appeal, check airmen are designees under delegated authority of the FAA, authorized to conduct flight checks, line checks, competency checks and proficiency checks in various aircraft on the FAA's behalf. 49 U.S.C. § 44709(d)(1) specifically authorizes the Administrator, "[s]ubject to regulations, supervision, and review [she] may prescribe [to] . . . delegate to a qualified private person, or to an employee under the supervision of that person, . . . matter[s] relating to . . . the examination, testing, and inspection necessary to issue a certificate" under Chapter 447, and § 44709(d)(2) provides that "[t]he Administrator may rescind [such] a delegation . . . at any time for any reason the Administrator considers appropriate."

It is, clear from the statutory language that: (1) such designees serve as fiduciaries of the Administrator in the certification process; (2) their status is achieved by delegation, rather than by certification; and (3) that status is

---

[1] Petitioner-Appellant's Reply at 2 (emphasis original).

subject to rescission by the Administrator, wholly at the Administrator's discretion. Thus, despite the adverse economic impact petitioner-appellant claims the action of the FAA's principal operations inspector will have on him, that action does not amount to an action amending, modifying, suspending or revoking, in whole or in part, a certificate held by him, and it is not, therefore, reviewable by the Board under §§ 44709(d) and (e)(3).

THEREFORE, IT IS ORDERED that appellant's petition to appeal in this proceeding are hereby DISMISSED for lack of jurisdiction, and that this proceeding is, therefore, TERMINATED.

Entered this 18th day of April, 2001, at Washington, D.C.

/s/ William E. Fowler, JR.
WILLIAM E. FOWLER, JR.
Chief Administrative Law Judge

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KEVIN W. DAISEY, Petitioner, v. NATIONAL TRANSPORTATION SAFETY BOARD; et al., Respondents.	No. 02-70341 NTSB No. NA-37 ORDER (Filed Jan. 24, 2003)

Before: REINHARDT, RYMER, and SILVERMAN, Circuit Judges

Petitioner's petition for panel rehearing is denied.

No further filings shall be accepted in this closed petition for review.

APPENDIX E

[LOGO]
U.S. Department
of Transportation
Federal Aviation
Administration

March 28, 2001

CERTIFIED MAIL-RETURN RECEIPT

Hawaiian Airlines, Inc.
Attn: Paul B. Wallis, Director of
Flight Standards
P.O. Box 30008
Honolulu, HI 96820-0003

Gentlemen:

We are notifying you in accordance with the Air Transportation Inspectors Handbook 8400.10, Volume 3, Chapter 3, Section 2, Paragraph 703 C that we are unable to approve Captain Kevin W. Daisey, Federal Aviation Administration (FAA) certificate number 149430745 as a check airman in the B-717. We are therefore also withdrawing his check airman authority in the DC-9 effective immediately.

The reasons are his performance during his own Line Check in the B-717 on March 21, 2001 and his performance when administrating two Simulator Proficiency Checks for the B-717 on March 24, 2001. We expect a Check Airman in the B-717 for Hawaiian Airlines to demonstrate and be able to demonstrate, beyond any doubt the use of all equipment in the aircraft to the maximum extend [sic] possible. He should also support all company procedures and not transmit non-standard philosophies to the Line Pilots being checked.

Captain Daisey's deficiencies in performance in these areas have left great doubt that he will be able to represent the Administrator as a Check Airman in this aircraft. Therefore we are left no choice but to resort to the action of disapproval and withdrawal of this privilege and request the return of his DC-9 Check Airman authorization letter within ten working days after receipt of this letter.

Sincerely,

/s/ Earl R. Young
Earl R. Young
Principal Operations Inspector

APPENDIX F

SERVED: February 1, 2002

NTSB Order No. EA-4939

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD at its office in Washington, D.C. on the 24th day of January, 2002

In the matter of KEVIN W. DAISEY, Petitioner-Appellant.	)	Docket NA-37

OPINION AND ORDER

ERRATA

Please make the following correction to the subject order, which was adopted on the 24th day of January, 2002, and served on February 1, 2002.

On Page 2, lines 13 and 18, please change "Section 44709(d)" to "Section 44702(d)".

/s/ Dave Bass
Office of General Counsel
Dated March 13, 2002